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Twenty-seventh session

SUMMARY RECORD OF THE 530th MEETING

Held at Headquarters, New York,
on Tuesday, 7 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

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The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services

Chapter II. Methods of procurement and their conditions for use

Article 16

1. Mr. LEVY (Canada), recalling the wording of the proposal he had made at the previous meeting for a footnote to article 16, paragraph 3 (b), said that it was more neutral than the proposal made by the observer for Australia at that meeting.

2. Mr. GRIFFITH (Observer for Australia) said that he had no objection to the wording of the Canadian proposal; however, in view of the adoption of the text of chapter IV bis, only a limited number of options for the procurement of services should be authorized. States adopting the Model Law should be allowed to limit the number of potential methods by limiting the scope of paragraph 3 (b) to some of the methods set out in articles 17 to 20. Acceptance of the Canadian proposals to include the procurement of goods and construction in the footnote would affect the original text of the draft, whereas only additional questions raised by the inclusion of procurement of services in the draft should be treated. His proposal offered a choice of restrictions with regard to services that took into account chapter IV bis, which remained the primary method for the procurement of services.

3. Mr. WALLACE (United States of America) and Mr. CHATURVEDI (India) supported the draft footnote proposed by the representative of Canada.

4. Mr. GRIFFITH (Observer for Australia) supported the Canadian proposal but thought that the commentary should include an additional paragraph on services and the adoption of chapter IV bis. It was important to know whether articles 17 to 20 were going to be retained or whether article 20 would be adequate by itself in view of the mechanisms provided for elsewhere. Should any of articles 17 to 20 be deleted, the final text would have to be amended to delete any references to services.

5. Mr. LEVY (Canada) said that it should be stressed in the Guide to Enactment or in the commentary that if articles 19 and 20 were deleted, there could be no recourse to single-source procurement or to emergency tendering.

6. Mr. CHATURVEDI (India) said that the last sentence of the Canadian proposal was quite clear. It did not mean that preference must be given to one particular method.

7. Mr. TUVAYANOND (Thailand) said that the Australian proposal to retain only article 20 was not acceptable because, where services were concerned, single-source procurement was not enough; other methods would be necessary.

Chapter V. Review

Articles 42 to 47

8. Mr. CHATURVEDI (India) said that any supplier or contractor who actually suffered loss or injury could not invoke paragraph 1 of article 42. The words "that claims to have suffered" should be deleted. Concerning the phrase "a breach of a duty imposed on the procuring entity", it could be objected that the word "duty" was a legal term which implied the notion of rights. There was no duty without rights. However, neither suppliers nor contractors had any rights until a contract was signed. The use of the word "duty" was therefore inappropriate in the paragraph. The wording of paragraph 2 of article 42 seemed acceptable as it stood. However, the review by the procuring entity provided for in article 43 was a duplication of the administrative review provided for in article 44. Should article 44 be retained, the footnote thereto would also have to be retained. In article 47, the name of the court or courts should not be indicated by the procuring entity. It was up to the parties concerned to choose the appropriate court. Only local law and the procedures of the competent court were applicable. In article 46, the seven-day period provided for the suspension of procurement proceedings left everything in the hands of the procuring entity with regard to the procurement proceedings. Suspension should not be automatic.

9. Mr. TUVAYANOND (Thailand) agreed with the representative of India that the words "that claims to have suffered" in article 42, paragraph 1, should be deleted; however, since they were included in the previously adopted text, it might be advisable to include a brief commentary on that subject in the Guide to Enactment. Any declaration of loss or injury should be duly substantiated for article 42 to be applicable. In paragraph 2 (a) bis of that article, it would be preferable for the sake of consistency to use the words "the selection procedure" rather than "the selection of the evaluation procedure". Lastly, he wished to know what safeguards had been anticipated to prevent abuses of the right to review.

10. Mr. CHOUKRI SBAI (Morocco) shared the views of the representative of India concerning the phrase "that claims to have suffered, or that may suffer" in article 42, paragraph 1. Furthermore, the paragraph should also indicate that within a period of 20 days, the supplier or contractor must submit a statement of the circumstances or, better still, the "causes" - a legal term - of the loss or injury which would give him the right to stop providing the articles he was supposed to deliver.

11. The deadlines specified in article 43, paragraphs 2 and 4, were too long. The period should run from the time the causes that had led to a change in circumstances became apparent. As soon as the supplier learned that circumstances had changed as a result of specific causes, he should so notify the procuring entity. In paragraph 4, the 30-day period provided for the submission of complaints was too generous: it should be reduced to 10 days. Complaint should in fact be submitted promptly. In addition, each country should be allowed to set its own deadlines for the submission of complaints by the supplier or contractor as well as the written decision by the procuring entity.

12. Mr. WALLACE (United States of America) recalled that the Commission had agreed not to change the general provisions of chapters I, II and V except where the inclusion of procurement of services so warranted; he therefore found the arguments of the representative of Thailand with respect to article 42, paragraph 2 (a) bis, well-founded: the provision did not appear to have been properly worded. That reservation aside, he thought that the text of chapter V should remain as it stood. With regard to the observations of the representative of India concerning article 47, he wished to point out that the article did not in fact give the procuring entity the option of deciding what court should have jurisdiction for judicial review. It was up to the lawmakers to specify the competent court.

13. The CHAIRMAN said he thought that article 42 was clear and adequately defined the cases eligible for review.

14. Mr. CHATURVEDI (India) noted that several issues remained controversial and said that the argument that the text had already been adopted did not hold, since the text was being re-examined from the standpoint of including services within the scope of the Model Law. He accepted the underlined portions of article 42, paragraphs 2 (a) bis and 2 (c). Article 45, on the other hand, was poorly worded; it was not all suppliers or contractors participating in the procurement proceedings who were to be advised, but only those who had submitted a complaint. In paragraph 2, only a supplier or contractor whose interests were actually affected had the right to participate in the review proceedings. In paragraph 3, "a copy of the decision of the head of the procuring entity" should be furnished only to the supplier or contractor submitting the complaint, not to all the others, and it should definitely not be "made available to the general public". In other words, his objections covered nearly all of the text of article 45.

15. With respect to article 46, his delegation's earlier reservation concerning the first paragraph, on suspension of procurement proceedings when a complaint was submitted, a measure of dubious value, also applied to the second paragraph. Moreover, the "public interest" did not have to be "certified". It was the validity of the corresponding ministerial decision that required verification. The concept of "urgent public interest considerations" was unclear; it was only the "public interest that mattered". At the end of the paragraph, the inclusion of the words "except judicial review" was not justified, since in India, and doubtless in many other countries as well, decisions that had bearing on the public interest were not subject to review by the courts once a decision had been taken by the competent administrative authority. The provision should therefore be changed.

16. The CHAIRMAN said that most delegations approved of the current wording of chapter V. There was a good reason for that, namely that the General Assembly had adopted the draft Model Law as it stood and had recommended it to Member States. It would not be appropriate, therefore, for the Commission to go back on its previous decisions. That would necessitate a meeting of the Sixth Committee. He therefore felt that UNCITRAL had completed its consideration of the draft amendments to the Model Law. Moreover, the Guide to Enactment (A/C.9/393) provided sufficient explanations. Accordingly, the Commission would soon take up the draft amendments to the Guide (A/CN.9/394, annex), which were

intended to reflect the inclusion of procurement of services within the scope of the Model Law.

17. Mr. CHATURVEDI (India) said that during the second phase of the debate the Commission should rethink the title of the Model Law and consider whether it even ought to include the word "services". Instead of changing the text of the Model Law to include that word, it might be better to deal with services in a protocol, on the understanding that the Model Law already adopted by the General Assembly could still be used by Member States.

18. The CHAIRMAN said that the Commission had concluded the first part of the discussion on the topic since it had made suggestions to the drafting group on the text of the Model Law. Once members had all the documents, the Commission could examine them together with the question of the title. He himself thought that chapter V should be left essentially as it stood.

19. Mr. CHATURVEDI (India) reiterated his objections, which had to do with India's national legislation, and said that there could be no talk of a consensus for that reason. Although he was aware that the wording of chapter V could not be changed, he wished to place his objections on record.

20. The CHAIRMAN assured the representative of India that his objections would be duly recorded.

Consideration of draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393 and A/CN.9/394)

21. Mr. WALLACE (United States of America) said that he wished to comment on the approach to be taken by the Commission. The Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393) was a descriptive rather than a prescriptive text and should not depart from the spirit of the Model Law. It was therefore important to avoid disparities between the two texts and to make sure that the amendments were compatible with the text of the Model Law.

22. The CHAIRMAN said that the secretariat had put a great deal of work into compiling the draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction, contained in the annex to document A/CN.9/394, which was well thought out and detailed, especially in view of the wealth of material covered.

23. Mr. WALLACE (United States of America) said that he would prefer to replace the word "commodities", which suggested a tangible rather than an intangible object, with the word "item", even though the latter was not entirely satisfactory. With regard to paragraph 5, which referred to a new article 14 bis to the Guide, he proposed several corrections that would more precisely define and differentiate the various selection methods.

24. Mr. SHIMIZU (Japan) recalled that early in the session his delegation had proposed eliminating the word "construction", a suggestion that had been immediately rejected by other delegations. Modern construction methods had many intellectual aspects that made them comparable to services. It would thus make

sense to treat procurement of construction and procurement of services in similar fashion. That had not been done in the text as it stood. He therefore hoped that the Guide to Enactment would include an explanation of the ways in which chapter IV bis of the draft Model Law could be applied to construction.

25. Mr. CHATURVEDI (India) said he did not think it was advisable to make amendments at present to the Guide, a lengthy and very fine document that had been carefully elaborated over the course of two sessions of the drafting group; any amendments that might ultimately be made could be compiled in an addendum. That would be the moment to make changes, if any, in the title of the draft.

26. The CHAIRMAN pointed out that the General Assembly had already approved the text of the Model Law and recommended it to Member States. The Guide to Enactment was a companion to that text. The Commission was examining the proposed amendments to be made to the Guide to adapt it in the light of the inclusion of services in the scope of the Model Law.

27. Mr. CHATURVEDI (India) said that since the Working Group had not been mandated to amend the Guide to Enactment, his delegation wished to dissociate itself from discussions on the issue, which were not binding on the Commission in any case.

28. Mr. HERRMANN (Secretary of the Commission) said he feared that the title which had been given to document A/CN.9/394 by the Secretariat, modelled on the title of the document on the amendments to be made to the Model Law, was creating confusion. The draft amendments to the Model Law were intended to create a second Model Law, more complete than the first, dealing not only with goods and construction, but also with services. The plan was to draw up a guide to accompany each of the two Model Laws; consequently, the Commission was not engaged in amending retroactively the Guide to Enactment that had been issued as document A/CN.9/393 and pertained to the first Model Law.

29. Mr. CHATURVEDI (India) said that he was satisfied with the Secretary's explanation and thought it would be helpful to change the current title of document A/CN.9/394 to read: "[Draft Amendments] to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services".

30. The CHAIRMAN suggested that the Commission should consider section II of the annex to document A/CN.9/394, entitled "Article-by-article remarks".

Chapter I. General provisions

31. Mr. WALLACE (United States of America), referring to point 16, said he was not sure that the passage in quotation marks was correct. During the debate in the Commission, members had been thinking of cases in which, for one reason or another, the price had not been revealed to the procuring entity. With regard to article 12, paragraph 3, of the Model Law, the members of the Commission had indicated that a minimum price should perhaps be set in a regulation rather than in the Model Law. That idea, to which the representative of Thailand in particular had referred, should doubtless be reflected in the commentary.

32. The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

33. Mr. JAMES (United Kingdom) recalled that the question of defining services had been raised in the Commission on several occasions, as had the question of distinguishing between technical services and services rendered by professionals. Moreover, that distinction was made in article 16, paragraph 3 (a), of the Model Law. The European Union itself made a distinction between those services which lent themselves to tendering and other services. It might be useful to include one or two brief examples in the Guide to Enactment, under the definition of services or in the section on article 16.

34. As the definition of services had been considerably broadened to include services which were not considered as such by all States, it might be appropriate to consider whether the procurement methods described in the Model Law ought to apply, for example, to the acquisition of real property.

35. Mr. CHATURVEDI (India) said that if the Committee decided to change the title of document A/CN.9/394, it must also ensure that it was changed in the annex. Furthermore, paragraph 1 bis of the document gave the impression that the Committee had modified the Model Law on Procurement of Goods and Construction at its current session, whereas it had actually adopted a Model Law on Procurement of Goods, Construction and Services. The paragraph should therefore be modified.

36. Mr. WALLACE (United States of America) drew attention to article 4 of the Model Law, entitled "Procurement regulations", and said that more thought should perhaps be given to the scope of the regulations, since States might wish to be able to rely on established principles and procedures in cases where there was a risk of conflict of interest, for example, when a firm was invited to participate in the design and then execution of a project.

37. He wished to raise the question of functions inherent to the State, which Governments might prefer not to entrust to firms under contract. That question should also be listed in the Guide to Enactment as one of the issues States might wish to address by means of national regulations.

Chapter II. Methods of procurement and their conditions for use

38. Mr. WALLACE (United States of America) said that the verb "should" in the comment on article 16, paragraph 4, ought to be replaced by a more imperative verb, in keeping with the Model Law, which used the word "shall".

39. Mr. JAMES (United Kingdom) recalled that the proposed text was intended to replace the existing one and that it was important not to change the content of the Guide. He felt that the sentence in paragraph 18 (1) which read "For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt ..." went a bit farther than the Guide and should probably be slightly modified to correspond more closely to the wording of the original Guide.

Chapter IV bis. Request for proposals for services

40. Mr. WALLACE (United States of America) felt that the comment on article 41 bis in point 21, paragraph 2, of the draft amendments, put forward some ideas which were certainly interesting, such as the concept of "value threshold", but which were not covered by the Model Law. He would like the text of the draft amendments to reflect that of the Model Law as closely as possible.

41. As for paragraph 2 of the comments on article 41 sexies, the idea that in the case of services in which the personal skill and expertise of the supplier or contractor were a crucial consideration, the procuring entity might wish to use one of the methods described in article 41 sexies, paragraphs 3 and 4, did not seem to correspond to the important distinction between paragraphs 2 (b) (i) and 2 (b) (ii) on the one hand and paragraphs 3 and 4 on the other. Technically speaking, all those paragraphs must be acceptable; at issue in the present case were services which could not be procured through tendering. One could not make such a distinction among paragraphs 2, 3 and 4, however. In addition, the final phrase, "since they, like tendering, permit ...", needed clarification. The obligation to inform providers whose proposals had not been accepted, set out in article 41 sexies, paragraph 4 (b), should doubtless also be made clearer in the Guide.

42. Lastly, for the sake of consistency with the Model Law, the Commission ought to delete the sentence in paragraph 5 of the comment on article 41 sexies which seemed to lament the fact that the procuring entity was not permitted to reopen negotiations with suppliers with whom it had already terminated negotiations because of the high price of their proposals.

43. Mr. LOBSIGER (Observer for Switzerland), referring to the second sentence of paragraph 1 of the comment on article 41 quater, said that it would be useful to identify the specific sections of the Model Law in which those criteria were listed, as had been done in the case of article 41 ter, for example.

44. Mr. TUVAYANOND (Thailand) asked whether the explanation of the threshold would be contained in the Working Group's report, in a footnote or in the Guide to Enactment.

45. The CHAIRMAN said that the drafting group had agreed to replace the word "threshold" with the expression "minimum level", although the Commission would have to vote on that decision when it considered the group's report. The explanation in question would indeed be included in the Guide to Enactment.

46. Mr. GRIFFITH (Observer for Australia) asked where and when the Commission planned to add a note to the Guide to reflect the footnote which had been drafted at the suggestion of the representative of Canada to indicate that it was now possible to limit the number of options available for the procurement of goods and construction and to state, in a separate paragraph, that since article 41 bis was intended to set out the principal method for procurement of services, it might be desirable to limit the application of article 16, paragraph 3 (b) in terms of paragraphs 19 or 20 alone, rather than paragraphs 17 to 20.

47. The CHAIRMAN said he thought it would be best to add that note to the section dealing with article 16 in the Guide to Enactment and to chapter I of the Model Law, which dealt with the principal characteristics of that instrument. He took it that the Committee had concluded its consideration of the agenda item before it.

The meeting rose at 12.55 p.m.